

association, the committee consequently accomplished a gentlemen's agreement with The Ohio Law Publishing Co. and The Ohio Law Reporter Co. They agreed to discontinue the publication of bound volumes of the opinions of the court of appeals so that the official publication would be the only bound volume edition. In return therefor, they were to publish in The Ohio Law Reporter and Weekly Law Bulletin, the opinions of the supreme court and courts of appeals, and manuscripts were to be furnished by the supreme court reporter without cost. This agreement required legislation in order to be workable, and accordingly a bill to amend Section 1483, 1488 and 1520 was passed. The aim of the bar association was well expressed in the report of the committee wherein they said, "Ohio must have only one set of Appellate Court Reports, officially edited and published on the same high standard as our respected Supreme Court Reports." The Ohio State Bar Association, Vol. 40, Report of the Special Committee on Uniform Systems of Reporting, p. 35 (1919). The aim of the bar association was, however, doomed to failure and resulted in the circumstances set forth above.

The problem of what to do with unofficially reported cases, however, should be viewed not alone from the lawyer's standpoint. From the point of view of the judges it merits serious consideration. Fundamentally it involves the doctrine of precedent, which is not a matter of judicial whim, but is an integral part of our judicial technique. We insist that the decisions of our courts be uniform, that, in the main, we shall be able to foretell the outcome of a given case by the decision or a similar set of fact in a former case before the same court. Also we know and expect that courts will lessen their labor by relying on previous decisions. If the judges do use and cite previously decided cases, they should be available. It would follow that the attorneys are justified in their criticism that the cases are not available to the average practitioner.

Whether it is possible to remedy the situation by legislation involves the question of legislative infringement upon the judicial power, a matter not within the scope of this note.

However it would appear (1) that the intended effect of the amended Section 1483 General Code is, that the official reports should be the only set of bound appellate court reports; (2) that this statute is not meant to modify whatever place precedent has in the deciding of cases; and (3) that some arrangement of filing and digesting appellate court decisions should be established in each of the nine appellate districts and that they should be readily accessible to the average attorney.

MAURICE A. YOUNG.

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## UNIQUE SERVICES AND THE STATUTE OF FRAUDS

The plaintiff entered into an oral agreement with Eugene Jones for the transfer of a lot in Bowling Green in consideration of care and services to be rendered by the plaintiff. The agreement was made in 1928 and the plaintiff performed all the services stipulated until Jones' death in 1932. In an action

for specific performance, it was decided the value of the services contracted for was intended to be and was easily susceptible of being measured in money, therefore such services did not constitute a sufficient act of part performance to take the case out of the statute of frauds and specific performance would not be granted. *Hathaway v. Jones*, 48 Ohio App. 447, Ohio Bar, Feb. 25, 1935 (Court of Appeals, Wood county—March 12, 1934).

In the case of *Gillespie v. Loge*, 40 O.L.R. 105, 17 Abs. 213 (Court of Appeals, Hamilton county—Feb. 6, 1933) Lillian Adams performed certain personal services, including nursing, sewing, commercial work, etc., for Mrs. Kaufmann under an alleged oral agreement to give her three parcels of real property in return for such services. The alleged agreement was made in May, 1919, a memorandum was drawn up in 1926, and Mrs. Kaufmann died Feb. 27, 1927. An action of partition being filed by one of the devisees under her will, Lillian filed a cross-petition claiming specific performance of the contract for the three parcels which were among those sought to be partitioned. The court held the services were not capable of being measured by a pecuniary standard, that they constituted sufficient part performance to take the case out of the statute of frauds, and that to deny relief would be aiding in the perpetration of a fraud.

A definite legislative policy was established when the Ohio legislature provided that no action should be brought to charge a person upon a contract or sale of land unless the agreement upon which the action was brought, or some memorandum or note thereof, was in writing and signed by the party to be charged therewith. Sec. 8621, G.C. Under the influence of early English decisions, beginning with *Butcher v. Stapely*, 1 Vern. 363 (1685), Ohio has adhered to the doctrine that part performance takes a case out of the statute. But this does not mean that the courts have been oblivious to the requirement of the statute, and certain restrictions have accordingly been placed upon the application of the doctrine. Under what conditions it is proper for the courts to apply these limitations is, however, by no means settled in this state.

Equity's jurisdiction in part performance cases is generally based on the ground of fraud. Whenever the denial of relief in equity would produce the evils which the statute was enacted to suppress, and would result in the perpetration of a fraud, the courts have felt it necessary to sustain the validity of the agreement, altho not in writing. *Sites v. Keller*, 6 Ohio 484 (1834), *Wheeler v. Reynolds*, 66 N.Y. 227 (1876), *Slingerland v. Slingerland*, 39 Minn. 197, 39 N.W. 146 (1888), *Nelson v. Nelson*, 334 Ill. 43, 165 N.E. 159 (1929), *Halligan v. Frey*, 161 Iowa 185, 141 N.W. 944, 49 L.R.A. (N.S.) 112 (1913). It is well established in Ohio, however, that such fraud must be actual. It is not enough that there has been a refusal to perform the oral agreement; there must be some actual imposition or deceit shown to have been practiced on the strength of the oral promise. *Newman v. Newman*, 103 Ohio St. 230, 133 N.E. 70, 18 A.L.R. 1089 (1921), *Watson v. Erb*, 33 Ohio St. 35 (1877), *Crabill v. Marsh*, 38 Ohio St. 331, 338 (1882).

No matter how strong the equities arising out of the transaction may be, however, the courts of England have consistently adhered to the limitation that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged. *Maddison*

*v. Alderson*, L.R. 8 App. Cas. (Eng.) 467 (1883). Some decisions in this country state the rule strictly—that the acts of past performance must be referable to the contract set up, and to no other one. *Rathbun v. Rathbun*, 6 Barb. (N.Y.) 98 (1849), *Semmes v. Worthington*, 38 Md. 298 (1873), *Erenmen v. Derby*, 124 Or. 574, 265 Pac. 425 (1928). Ohio seems to favor the more liberal rule, namely, that it is enough if the acts are referable to some contract in relation to the subject matter in dispute. *Shahan v. Swan*, 48 Ohio St. 25, 26 N.E. 222, 29 Am. St. Rep. 517 (1891), *Stark v. Turner*, 23 N.P. (N.S.) 313 (1921), but in *Burckhardt v. Greene*, 7 C.C. (N.S.) 515, 16 C.D. 313 (1902)—affirmed without opinion in 68 Ohio St. 711, 70 N.E. 1116—the court seemed to have the stricter rule in mind, and a similar attitude was taken in *Ringer v. Benedict*, 39 O.L.R. 1, 15 Abs. 265 (1933).

The courts of this state have felt that possession, altho it stands alone, is an act that necessarily refers to some contract relating to that particular land. "When the existence of a contract is evidenced by a change of possession, which must result from the joint act of the parties themselves, the mischief intended to be remedied by the statute is scarcely to be apprehended." *Wilbur v. Paine*, 1 Ohio 251 (1824), *Wagoner v. Speck*, 3 Ohio 293 (1827), *Moore v. Beasley*, 3 Ohio 294 (1827), *Bridgman v. Wells*, 13 Ohio 43 (1844), *Grant v. Ramsey*, 7 Ohio St. 158 (1857), *Aircraft Specialty Co. v. Center Woodland Realty Co.*, 40 Ohio App. 125, 178 N.E. 313 (1931). The possession must be exclusive, and be connected with and in consequence of the contract, in order to substantiate it. *Myers v. Croswell*, 45 Ohio St. 543, 15 N.E. 866 (1888), *Armstrong v. Katterhorn*, 11 Ohio 265 (1842), *Thomas v. Watt*, 15 O.D. 427 (1905). Where the possession is not exclusive, permanent improvements may be sufficient acts of part performance. *Prechtel v. Prechtel*, 16 C.C. (N.S.) 528, 25 C.D. 581 (1905).

Payment is not a sufficient act of part performance. *Sites v. Keller*, ante; *Pollard v. Kinner*, 6 Ohio 528 (1834). The fact that payment has been made in personal services makes no difference. *Newbold v. Michael*, 110 Ohio St. 558, 144 N.E. 175 (1924), *Kling v. Bordner*, 65 Ohio St. 86, 61 N.E. 148 (1901), *Crabill v. Marsh*, ante; *Nunn v. Boal*, 29 Ohio App. 141, 162 N.E. 724 (1928). The reason usually given for the rule is that the money may be repaid, but it is significant that no exception is made where the vendor is insolvent. *Newman v. Newman*, ante. The vendee may recover the value of his services at law on quantum meruit. *Struble v. Struble*, 42 Ohio App. 353, 182 N.E. 48 (1932), *Himes v. Rickman*, 17 Abs. 574 (1934), also dictum to that effect in *Kling v. Bordner* and *Nunn v. Boal*, ante.

In England services do not constitute a sufficient part performance because they do not unequivocally and in their own nature refer to any contract. *Maddison v. Alderson*, ante. Judge Cardozo, in *Burns v. McCormick*, 233 N.Y. 230, 135 N.E. 273 (1922), adheres to this view. "What is done must itself supply the key to what is promised. Equity does not treat the statute as irrelevant, not ignore the warning altogether. It declines to act on words, though the legal remedy is imperfect, unless the words are confirmed by deeds."

The rule has gained considerable strength in this country, that specific

performance will be decreed where services are of such a peculiar character as to render it impossible to estimate their value to the vendor by a pecuniary standard, the vendor not having intended to measure them by such a standard. This view was probably established by an old New York case, *Rhodes v. Rhodes*, 3 Sandf. Chancery 279 (1846), which justified its decision as being within the rule of *Clinan v. Cooke*, 1 Sch. & L. (Ire.) 22, 9 Rev. Rep. 3 (1802). But the latter case denied specific performance because there was no act of taking possession which would make the vendee a trespasser unless explained by a parol contract. It is difficult to conceive how the uniqueness of the services can have any possible bearing on the requirement that the acts must be unequivocally referable to a contract relating to land. For practical purposes, this rule is an exception which does not fall within the general limitation. Not infrequently, services receiving this classification relate to care for a person with a repulsive or incurable disease. *Rhodes v. Rhodes*, ante; *Velikanje v. Dickman*, 98 Wash. 584, 168 Pac. 465 (1917).

There is a dictum in Ohio to the effect that the courts might adopt this unique service rule if a proper case were presented. *Shahan v. Swan*, ante; *Newbold v. Michael*, ante. It has received little support, however. In the *Newbold* case it was held that services rendered an aged person are not sufficiently unique. In accord, *Ortman v. Ortman*, 45 Ohio App. 551, 187 N.E. 588 (1933), *Nunn v. Boal*, ante; *Struble v. Struble*, ante; *Kling v. Bordner*, ante. Likewise, filial services under an adoption contract are not sufficiently unique. *Arter v. Ulery*, 17 N.P. (N.S.) 449 (1915)—affirmed without opinion in 91 Ohio St. 376, 110 N.E. 1053. The court in the *Shahan* case felt such services might be unique, but that the circumstances under which they were rendered did not indicate they were done pursuant to any contract relating to property. This seems to indicate a tendency in Ohio to follow the view taken in New York and England, that the ultimate test should be whether or not the acts themselves are referable to a contract relating to land.

Only two decisions have been found in Ohio applying the unique service rule; *Gillespie v. Loge*, one of the cases under discussion, and *Swaney v. Wiles*, 8 Abs. 623 (1930). In the latter case, services rendered by a sister, including companionship, were held not to be measurable by a pecuniary standard, and specific performance of the oral land contract was decreed. In view of previous Ohio decisions, the services relied upon in these two cases do not seem to be of the nature contemplated by the dictum in the *Newbold* and *Chahan* cases.

However that may be, the Supreme Court seems to have settled the controversy in a recent case. *Hodges v. Ettinger*, 127 Ohio St. 460, 189 N.E. 113 (1934). It was there held that services do not point unequivocally to any contract, and therefore the doctrine of part performance has no place in the law governing contracts for personal services. The court was considering an agency contract, no land being involved. In a dictum, the court stated that the doctrine can be invoked to take a case out of the statute of frauds in Ohio only in cases involving the sale or leasing of real estate, *wherein there has been a delivery of possession of the real estate in question*, and in settlements made upon consideration of marriage, followed by actual marriage. In most cases where personal services are rendered in payment for the land, the vendee never gets exclusive possession. (It is left for the reader to figure out how marriage can point unequivocally to a land contract).

The most logical solution seems to rest in a balance of policies. The power to depart from the letter, in supposed adherence to the spirit, should not be exercised unless the policy of the law is saved. *Burns v. McCormick*, ante. However, let there once be established a contract (by reliable, disinterested witnesses, by an authentic memorandum which shows the intent of the parties, or by other proof which admits of no doubt) which contravenes no sound public policy, which is not unconscionable, which appeals to the conscience of the court and accords with natural justice, the proposition that the performance must be "unequivocally referable to the agreement" becomes of no moment—except as it may have had a bearing on the establishment of the contract. *Salem v. Finney*, 127 Misc. 387, 215 N.Y. Supp. 553 (1926). Such a view would be feasible because it has been held in Ohio that it is not error to admit parol evidence of the terms of the contract before proof of its part performance has been given. *Shahan v. Swan*, ante. We do not have in mind a result such as that reached in *Gramann v. Borgmann*, 14 N.P. (N.S.) 449, 31 O.D. 668 (1913), where it was decided that the oral land contract was established by clear and convincing evidence where two interested witnesses testified to events occurring 41 years before. However, if this approach to the problem were adopted with due caution and regard to a balance of the fundamental policies involved, the full intent and purpose of the statute could be better realized.

EDWIN R. TEPLE.

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## RIGHT OF A BANKRUPT TO SUE ON A CLAIM WHICH AROSE BEFORE BANKRUPTCY WHICH WAS NOT PROSECUTED BY THE TRUSTEE

This question was incidentally raised in Ohio in the case of *Whitehead, Adm'r v. Parsons*, 16 Ohio Abs. 274, Lucas County Ct. of Appeals, Jan. 2, 1934. Parson conveyed land to Pickard, who was to make part payment in cash and give a purchase money mortgage for the balance. Pickard never paid the full amount of the cash payment. Later, Parsons was declared a bankrupt, the estate administered and closed, and the bankrupt discharged. The transaction between Parsons and Pickard was included in the schedule, but its true nature was not disclosed. This action was brought to recover the unpaid balance of the cash payment from Whitehead, who was Pickard's administrator.

The court did not decide the question in which we are interested, but, in a dictum, it said, "She (Parsons) could not, after being adjudicated a bankrupt and having received her discharge, ordinarily bring suit upon any right of action that was vested in her at the time she filed her petition in bankruptcy."

Under the Bankruptcy Act of 1898, the property and powers of the bankrupt, as set out in Sec. 70a (11 U.S.C.A. 110a), and the "rights, remedies and powers" of creditors, as mentioned in Sec. 47a-2 (11 U.S.C.A. 75a-2), are vested in the trustee "by operation of law." In particular, Sec. 70a